

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

IN RE:  
DANIEL O. TOMLIN, JR.,

Debtor.

Case No. 99-35175-BJH-7

ROBERT MILBANK, JR., TRUSTEE

Plaintiff,

VS.

Adversary No. 01-3458

DANIEL O. TOMLIN, III, et al.,

Defendants.

**ORDER ON ADMISSIBILITY OF TRUSTEE'S  
EXHIBITS 68, 69 & 70, SUBPOENAED ROLLS ROYCE  
FILES AND VOLUME 2 OF THE JUDY TOMLIN DEPOSITION**

Came before the Court certain outstanding issues arising out of the above captioned adversary proceeding. After consideration of the papers submitted to the Court and the arguments raised at the trial, the Court, pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014, submits this order as its findings of fact and conclusions of law.

**TRUSTEE'S EXHIBITS 68, 69 AND 70 ARE ADMITTED**

The Trustee seeks to have his Exhibits 68,69 and 70 admitted. These documents were voluntarily produced by Defendant Judy Tomlin (the "Defendant") to the Trustee in the regular course of discovery, as indicated by their bates stamping. The Defendant has objected to their admission as exhibits on the basis that these documents are privileged. The Court overrules this objection and finds that the Trustee's Exhibits 68, 69 and 70 are admitted.

The Fifth Circuit has stated that a "voluntary disclosure of information which is inconsistent with the confidential nature of the attorney client relationship waives the privilege." *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *see also Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2064, 104

L.Ed.2d 629 (1989); *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984).

The Court finds that the Trustee's Exhibits 68, 69 and 70 were voluntarily disclosed by the Defendant, thus waiving any privilege protecting said documents. The Court bases this finding on the following facts: the documents were bates stamped for production and not merely included in a large stack of documents by accident; other additional documents were produced concerning the formulation of the same Tomlin entities where no privilege has been raised; prior to this case being referred to this Court, the Defendant raised a general privilege objection that was overruled, wherein the Magistrate stated that all documents were to be produced unless a specific objection was made, however, no specific objection was made on a privilege log as to these documents; in explaining his reasoning for not providing a privilege log, counsel for the Defendant stated that he was not withholding any documents on the grounds of privilege; and Dan Tomlin Jr. (the "Debtor") testified about Exhibit 68 without objection at his August 5, 2002 deposition. Thus, based on these facts, the Court finds that Exhibits 68, 69 and 70 were voluntarily disclosed and thus any privilege that may have attached to these documents has been waived. Therefore, the Trustee's Exhibits 68, 69 and 70 are hereby admitted.

In addition, even if the disclosures were inadvertent as the Defendant contends, the Court also finds that the Defendant has waived any privilege as to Exhibits 68, 69 and 70. In the Fifth Circuit there is no *per se* waiver of privilege where a party inadvertently discloses privileged documents, as courts take a case-by-case approach to waiver. *Alldread*, 988 F.2d at 1434. In coming to this conclusion to adopt the case-by-case approach, the Circuit stated the following:

This analysis serves the purpose of the attorney client privilege, the protection of communications which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.

Id. In analyzing the facts above, the Court finds that there has been no clear demonstration "that continued protection is warranted." Id. Moreover, irrespective of any waiver, the attorney-client privilege would not attach to these documents as they do not seek or communicate legal advice. Thus, based on the facts before the Court, the Court finds that not only was the attorney client privilege waived when Exhibits 68, 69 and 70 were disclosed, but even if the privilege has not

been waived, the Exhibits would not have qualified for the privilege. Therefore, the Trustee's Exhibits 68, 69 and 70 are hereby admitted.

**THE DEFENDANT MUST PRODUCE A COPY OF THE SUBPOENAED ROLLS ROYCE FILES**

The Trustee seeks to have this Court require the Defendant to produce a copy of the subpoenaed Rolls Royce files for marking as an exhibit. The Rolls Royce files were produced pursuant to a trial subpoena issued on June 30, 2003, but were not marked in their entirety in order for the Defendant's counsel to look at the file's contents, after which a stipulated list of the file would be marked. No such stipulated list was submitted. Pursuant to Federal Rule of Civil Procedure 45, if documents subject to a subpoena are privileged, that party can seek to have the subpoena quashed. FED.R.CIV.P. 45(c)(3)(A). No such motion to quash was filed. Moreover, if any documents that are subject to a claim of privilege are withheld, "the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." FED.R.CIV.P. 45(d)(2). No such express claim was made. Finally, "[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." FED.R.CIV.P. 45(e). Though it appears that the parties attempted to come to an amicable resolution over the admission of the Rolls Royce files, none has been consummated. As these files were produced pursuant to a valid subpoena without objection, these files are to be included in the record as an exhibit at the Trustee's request. As the Trustee has requested the Rolls Royce files be admitted as an exhibit, the Court orders the Defendant to produce a copy of these files, along with their folder labels, for marking as an exhibit. Failure to do so may result in the Defendant and her counsel being deemed in contempt of this Court and subject to sanctions.

**VOLUME 2 OF THE APRIL 2003 DEPOSITION OF THE DEFENDANT IS ADMITTED**

The Trustee seeks to have Volume 2 of the April 2002 deposition of the Defendant admitted and marked as Exhibit 83A. There has been no objection raised by the Defendant. In fact, not only is the testimony of a party admissible for all purposes, FED.R.EVID. 801(d)(1), Volume 1 of the April 2002 deposition has already been admitted and marked as Exhibit 83. Therefore, the Court admits Volume 2 of the April 2002 deposition of Defendant Judy Tomlin and marks it as Exhibit 83A.

Based on the foregoing,

**IT IS ORDERED** that Defendant Judy Tomlin's Objection to the Admissibility of Trustee's Exhibits 68, 69 and 70 is hereby **OVERRULED**; therefore, the Trustee's Exhibits 68, 69 and 70 are hereby **ADMITTED**;

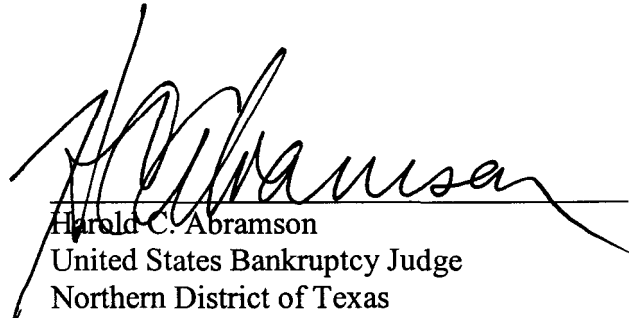
**IT IS ORDERED** that the Trustee's request to have this Court order Defendant Judy Tomlin to produce a copy of the subpoenaed Rolls Royce files for marking as an exhibit is **GRANTED**; therefore, Defendant Judy Tomlin is required to produce a copy of these files, along with their folder labels, for marking as an exhibit; **IT IS FURTHER ORDERED** that failure to produce such files may result in Defendant Judy Tomlin and her counsel being deemed in contempt of this Court and subject to sanctions;

**IT IS ORDERED** that Volume 2 of the April 2002 deposition of Defendant Judy Tomlin is hereby admitted and marked as Exhibit 83A.

**IT IS SO ORDERED.**

Signed this \_\_\_\_ day of August, 2003.

**AUG 27 2003**



Harold C. Abramson  
United States Bankruptcy Judge  
Northern District of Texas